No. 85-5189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF FOR THE PETITIONER

* STEPHEN J. CRIBARI
Deputy Federal Public Defender
for the District of Maryland
FRED WARREN BENNETT
Federal Public Defender
for the District of Maryland
612 Mercantile Bank & Trust Bldg.
Two Hopkins Plaza
Baltimore, Maryland 21201
Telephone: (301) 962-3962
(F[illegible]) 922-3962

* *Counsel of Record*
(appointed by this Court)

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

MR. McLAUGHLIN WAS UNFAIRLY CONVICTED OF VIOLATING 18 U.S.C. SECTION 2113(d) BECAUSE THE UNLOADED HANDGUN HE DISPLAYED IS NOT A DANGEROUS WEAPON WITHIN THE MEANING OF 18 U.S.C. SECTION 2113(d)

Mr. McLaughlin was indicted under 18 U.S.C. Section 2113(d) for committing an assault with a dangerous weapon or device during a bank robbery. The indictment specifically states that he "did assault [three tellers] by pointing a firearm at them and in their direction." J.A. 4; Brief for the United States at 3 n.1. The Government conceded that the handgun was not loaded. J.A. 9. However, in the Fourth Circuit,[1] an unloaded handgun is, as a matter of law, a dangerous weapon for purposes of enhanced punishment under 18 U.S.C. Section 2113(d). *Bennett*, 675 F.2d 596.

A. The Legislative History Does Not Show That It Was Congress's Intent To Include Unloaded Firearms Within The Phrase "Dangerous Weapon Or Device"

The Government has argued that the legislative history of Section 2113(d) demonstrates Congress's intent to punish the use of dangerous weapons even if those weapons were not objectively capable of inflicting the harm threatened. The Government's position is that the floor exchange between the bill's manager, Congressman Sumners, and other Congressmen, demonstrates this intent. However, careful reading of the floor exchange reveals a

---

[1] *United States* v. *Bennett*, 675 F.2d 596, 599 (4th Cir.), *cert. denied*, 456 U.S. 1011 (1982) ("A weapon openly exhibited by a robber during a robbery *is* a dangerous weapon whether loaded or unloaded, and such exhibition violates §2113(d)." (emphasis added)).

far different implication than the one drawn by the Government.

> MR. DOCKWEILER: May I say that a man might go into a bank with intent to rob and use a gas bomb, which would not in itself be dangerous.
>
> MR. BLANTON: Yes; or he might use one of these new kind of Indiana six shooters carved out of a piece of wood with a pocketnife.
>
> MR. SUMNERS OF TEXAS: I suggest to the gentleman that section 2 covers the matter, although I have no objection to adding the words "or device."

78 Cong. Rec. 8132 (1934). Section 2 was the section which covered bank robbery by trick, artifice, or fraud and presaged Section 2113(b) (bank larceny). Section 4(a) was a precursor of Section 2113(a) (bank robbery assault) while section 4(b) was a precursor of Section 2113(d). Thus, the bill's manager was suggesting that using a fake weapon to commit a bank robbery would be covered under the section punishing bank larceny by trick, artifice, or fraud, and not section 4(b) (dangerous weapons).

Moreover, section 4(a) covered bank robbery "by force and violence, or by putting in fear." 78 Cong. Rec. 8132. The discussion in the legislative history about putting people in fear by exhibiting bottles of nitroglycerin (whether real or fake) suggests that such items are covered by the "putting in fear" language of section 4(a). This section is now Section 2113(a) which punishes bank robbery assault.

The conclusion to be drawn from the legislative history is that the exhibition of unloaded handguns without more would warrant punishment under what is now Section 2113(a) and (b). More is needed under Section 2113(d). *See*

Bradley v. *United States*, 447 F.2d 264, 273-75 (8th Cir. 1971).

B. An Unloaded Handgun Is Not An Objectively Dangerous Weapon Simply Because It Might Provoke A Violent Response By Others Or Could Be Used As A Bludgeon

The Government argues: "Brandishing an unloaded gun during a bank robbery is also objectively dangerous because it greatly increases the risk of provoking a violent response."[2] Brief for the United States at 9. Of course, it is not the brandishing of the gun which must be objectively dangerous but rather the gun itself, for Section 2113(d) punishes an assault on a person during a bank robbery "by the use of a dangerous weapon." If the weapon is not objectively dangerous, then raising the specter of potentially "deadly retaliation is inapposite since no dangerous weapon was used as Section 2113(d) plainly requires under that aggravating alternative." *United States* v. *Beasley*, 438 F.2d 1279, 1285 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971) (McCree, J., concurring in part and dissenting in part). If Section 2113(d) protects people not from dangerous weapons but rather from fear and the invited or uninvited responses of third parties, then it follows that there is little difference (for Section 2113(d)) between a loaded or unloaded handgun and "the pointing by the robber in his coat pocket of his finger or hand so as to make the victim believe the bulge to be a pistol which the robber intended to use in the event of the

---

[2] In Mr. McLaughlin's case, the danger of police response was imminent: While in the bank, Mr. McLaughlin's codefendant seemed to notice a city police officer outside the bank. When he and Mr. McLaughlin quickly exited the bank they were immediately confronted by that police officer who had drawn his service revolver. J.A. 9. No one was injured.

victim's resistance." *Campbell* v. *State*, 464 S.W. 2d 334, 337 (Tenn. 1971) (Galbreath, J., dissenting). If the purpose of Section 2113(d) is to protect victims from fear and the actions of third parties, then the source of the fear is immaterial. *Id.*

The Government also has advanced the argument, based on *United States* v. *Wardy*, 777 F.2d 101 (2nd Cir. 1985), that an unloaded handgun is a dangerous weapon because it could be used as a bludgeon. *Wardy*, like many of the state cases cited by the Government, is a case where a handgun not only could have been used as a bludgeon but was, in fact, used as a bludgeon. Also, the court noted that "the jury was entitled to infer that the gun was loaded." *Id.* at 106. In other words, *Wardy*, and cases on which it relies, merely holds that an unloaded handgun used as a bludgeon and which a jury could infer was loaded, could be a dangerous weapon under the federal bank robbery statute. *See id.* at 105.[3]

Similarly, the Government relies on Judge Sneed's concurring opinion in *United States* v. *Brannon*, 616 F.2d 413, 419-20 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980), to support the proposition that the flourishing of an unloaded handgun is a violation of Section 2113(d) because pistol whipping is being threatened. However, the majority opinion based its holding on the fact that "(a)bsent evidence to the contrary, if a gun is used during a bank robbery, the jury may infer that the gun was loaded." *Id.* at 419.

The Government has relied on many state cases to support the proposition that an unloaded handgun's

[3] For surveys of federal and state cases dealing generally with the issue, *see* Annot., 32 A.L.R. Fed. 279 (1977); 81 A.L.R. 3d 1006; 79 A.L.R. 2d 1412 (1971).

potential use as a bludgeon warrants punishment for use of a dangerous weapon during a bank robbery. However, virtually all of these cases are cases where either the handgun was in fact used as a bludgeon, or where there was a specific definitional statute defining a bludgeon (or unloaded handgun) as a dangerous weapon, or where there was sufficient evidence in the record to support the jury's inference that the gun was loaded.

The Government has also cited many state statutes in support of the proposition that an unloaded handgun used during the robbery is a dangerous weapon. The implication, of course, is that an unloaded handgun similarly ought to be found to be a dangerous weapon for purposes of Section 2113(d). More important than the states' conclusion that an unloaded handgun can be a dangerous weapon when used during a bank robbery is the fact that it is a legislative decision.

Absent a definitional statute (present in virtually all state cases or statutes on which the Government relies), there is no authority for concluding an unloaded handgun is a dangerous weapon *unless* the fact-finder can infer from the gun's use that it was loaded. This is a question of fact and not a question of law.[4]

C. Displaying An Unloaded Handgun During A Bank Robbery Is Punishable Under 18 U.S.C. Section 924(c).

The Government could have used 18 U.S.C. Section 924(c) to convict Mr. McLaughlin. A conviction for bran-

[4] Of course, the Government relies upon *United States* v. *Bennett*, 675 F.2d 596 (4th Cir.); *United States* v. *Crouthers*, 669 F.2d 635 (10th Cir. 1982); *United States* v. *Beasley*, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971), and *Baker* v. *United States*, 412 F.2d 1069 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970). It is the Fourth Circuit's decision in *Bennett* and, by implication, the decisions of the companion circuits, that are challenged in this instant proceeding.

dishing an unloaded handgun during a bank robbery would warrant the mandatory punishment of Section 924(c), since an unloaded handgun falls within the definition of a firearm according to 18 U.S.C. Section 921(a)(3).[5] However, if there is no requirement that the weapon itself be objectively dangerous, then there is no distinction between Section 2113(d) and Section 924(c). Similarly, if there is no requirement that the handgun be objectively dangerous, there is no distinction between Section 2113(a) and Section 2113(d). *Bradley*, 447 F.2d at 273-75. The use of a handgun in a Section 2113(a) assault should not also be punished under Section 2113(d) unless the weapon was objectively dangerous.

D. When A Court Holds That The Exhibition Of An Unloaded Handgun Without More Is Proof That The Handgun Was A Dangerous Weapon, It Establishes An Unconstitutional Irrebuttable Presumption

If this Court rules that the brandishing of an unloaded handgun during a bank robbery *without more* is, as a matter of law, use of a dangerous weapon during a bank robbery, then there would be nothing unconstitutional in the irrebuttable presumption established by *Bennett:* that the exhibition of a weapon by a robber during a bank robbery "is a dangerous weapon whether loaded or unloaded." 675 F.2d at 599. However, if this Court rules that an unloaded handgun displayed during a bank robbery either is not as a matter of law a dangerous weapon,

[5] At the time Mr. McLaughlin committed the bank robbery for which he was convicted, he could not have been consecutively punished under 18 U.S.C. § 924(c) as well as under 18 U.S.C. § 2113(d). *Simpson* v. *United States*, 435 U.S. 6 (1978). However, since the Comprenehsive Crime Control Act of October 12, 1984, consecutive punishment under both statutes would be permissible.

or that it *can be* a dangerous weapon depending on the circumstances of its use, then the irrebuttable presumption established by *Bennett* is unconstitutional, for it would effectively remove from the finder of fact the necessity of drawing a conclusion that the weapon that could be dangerous was, in fact, dangerous.

Assuming that this Court rules that an unloaded handgun *could be* a dangerous weapon under Section 2113(d), the Fourth Circuit's holding in *Bennett* would unconstitutionally relieve the Government of the burden of proving that a particular unloaded handgun was, in fact, a dangerous weapon. *In re Winship*, 397 U.S. 358 (1970).

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

FRED WARREN BENNETT
Federal Public Defender
/s/ STEPHEN J. CRIBARI
Deputy Federal Public Defender
612 Mercantile Bank & Trust Bldg.
Two Hopkins Plaza
Baltimore, Maryland 21201
Telephone: (301) 962-3962
(FTS) 922-3962